Supreme Court, U. S.
FILED
AUG 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

against

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

1. Whether, in view of the federal-state program established through the Social Security Act by Congress at the same time as it created the National Labor Relations Act, the wide range of judgment left to the States under this program, and congressional awareness of New York's statute which predated the federal enactments, the Court of Appeals for the Second Circuit correctly refused to create

a judicial bar to the implementation of New York's unemployment insurance law as it relates to strikers?

2. Whether, in view of the extensive evidence that Congress has not considered the denial of unemployment compensation to strikers to be essential to governmental neutrality, the Court of Appeals for the Second Circuit correctly refused to create a judicial bar to the implementation of New York's unemployment insurance law as it relates to strikers?

3. Whether the Eleventh Amendment applies to suits for money damages against the New York State Department of Labor and Department of Taxation and Finance, seeking return of taxes paid to the State's Unemployment Insurance Fund?

Statement

A. The Nature of the Proceeding

This action was filed by the New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited) (hereinafter "petitioners" or "Telco") in 1973, attacking New York Unemployment Insurance Law Section 592.1 which prohibits the payment of unemployment benefits for the initial seven weeks after the commencement of a strike, lockout, or other industrial controversy and permits the accumulation of such benefit rights after this suspension period subject to the requirement of availability and capability to work and other eligibility prerequisites.

Telco claimed that the payment of unemployment insurance benefits to strikers after the lengthy disqualification period, contravenes the federal labor policy and frustrates the operation of the National Labor Relations Act, *as amended*, 29 U.S.C. 151 *et seq.*, in violation of the Supremacy Clause of the United States Constitution and, in addition, that the State statute violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Telco seeks injunctive and declaratory relief and damages. See Complaint herein. (Appendix 9-33).*

Defendant state officials (hereinafter "respondents") alleged, *inter alia*, that the National Labor Relations Act contains no provision which is in conflict with § 592.1 of the New York Unemployment Insurance Law, and Congress has refused to amend the law so as to bar the State enactment; that Telco had sustained no legally cognizable damage by virtue of this statute or any action of defendants; and that since New York State has not consented to a suit for money damages in federal court, the case falls squarely within the prohibition of the Eleventh Amendment (A. 34-47).

Respondents moved for summary judgment on September 27, 1974, on the grounds that since petitioners had shown no violation of federal law, there was no basis for judicial intervention by the federal courts. The motion was denied in a brief opinion dated March 26, 1975 (Petition 55a-56a).**

On May 23, 1977, the District Court held the New York statute invalid under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, as an unconstitutional infringement upon federal labor policy. (Petition 23a-54a), reported at 434 F. Supp. 810.

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* Hereinafter, references to page numbers in the Appendix will be prefaced by "A."

** Hereinafter, references to the petition will be prefaced by "Pet."

The Second Circuit unanimously reversed and held (Meskill, J.):

> "Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. Quite to the contrary, it has evinced an intention to leave the States free to regulate in this area." (Pet. 17a)

B. The Facts

The New York statute violates no provision of the National Labor Relations Act, and therefore the requirements of the national regulatory scheme must be determined by examination of pertinent legislative history. The facts concerning the CWA strike, and the duration of strikes in New York generally, are irrelevant to the legal issues confronting this Court. However, these facts will be fully set out as part of the Statement herein. Analysis of the evidence demonstrates that the factors involved are immensely complex, and that a trial is a particularly unsuitable vehicle for reaching a determination on a preemption claim.

In addition, since the undisputed statistical data on strike duration overwhelmingly contradicts the assumption that the New York statute has a significant impact on the outcome of collective bargaining, the District Court's conclusion that petitioners had sustained their burden of proof was clearly erroneous. *United States* v. *Gypsum Co.*, 337 U.S. 364, 395-396 (1948).

1. The Statute: Unemployment Insurance Law § 592.1

The "significant impact" which New York's law is alleged to have had on petitioners in the forty years in which this statute has existed in substantially the same form, is the development of a single strike exceeding the eight week suspension and waiting period. Petitioners contend that but for the availability of unemployment benefits in New

York,* the Telco employees would have ratified the pattern contract negotiated in July, 1971 in connection with the nation-wide Bell System strike. The facts rebut this assumption. In the numerous States** which provide for unemployment benefits during a strike where an employer (such as a telephone company) continues in substantial operation, the Bell System employees ratified the national contract. Employees in these other States would have been paid unemployment compensation from the outset. Yet it was the New York employees who were barred from such payments for the first eight weeks who voted to strike, while those whose States' unemployment benefit provisions gave them the greater advantage voted to accept the company's offer.

2. Financial Factors During the Strike

Although the Telco employees would have been eligible for unemployment insurance for many more months at the time of settlement, they agreed to a contract which was substantially the same as the one originally offered (Tr. 177-178). It differed from the wage increase in the original pattern settlement by a maximum of $1.50 *per week* for some upstate employees in the top crafts (Tr. 105-106, A. 412-413) and the Saturday differential pay was not sub-

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* The maximum, erroneously cited by the District Court as $95 weekly (Petition 28a) was $75 per week (Trial Transcript, p. 776 [hereinafter "Tr."]) and even this was available only to employees whose base salary was at least $149 per week. Petitioners supply this Court (p. 6) with the maximum as of September, 1978, but omit the fact that employees must earn at least $249 weekly to be eligible for this maximum.

** E.g. Illinois, Indiana, Maine, Massachusetts, New Hampshire, Vermont, Pennsylvania and New Jersey. Defendants' Exhibit 1, "Comparison of State Unemployment Insurance Laws," United States Department of Labor, Manpower Administration, Unemployment Insurance Service (January 1972) Table 405 (hereinafter "U.S. Labor Dept. Chart, Defs. Ex 1"), (A. 248-251).

stantial (A. 413). A provision for an agency shop was of marginal interest to the striking union members (Tr. 923), since it did not involve their wages or working conditions. Moreover, the original contract had already provided for a modified agency shop, which would have applied to all new employees (A. 304).

Indeed, Telco's own statement and outline drafted for the federal Wage Board after the strike described the settlement as follows: "All terms [are] generally identical with the pattern of those of other Bell System companies," and the slight additions to the pattern "are insignificant especially when one considers that their percentages are significantly reduced for the first year of the contract because of the seven months' strike." (A. 413; Defs. Ex. 77, A. 265-270).

Telco settled the strike in February, 1972. This date bore no relation to the time when the employees became eligible for unemployment benefits (September, 1971), nor to the time they would have ceased to be eligible (July, 1972) (A. 400-401).*

Moreover, although Telco refers (p. 26) to "continuing financial pressure" as a result of unemployment insurance tax payments, there was *no* financial pressure on Telco as a result of the strike. Dr. William Melody of the University of Pennsylvania** testified that the same instrumentality—

* Petitioners (p. 8) and *amicus* Chamber of Commerce (p. 23) state that the Telco strike was declared illegal by the National Labor Relations Board. However, petitioners concede (Pre-trial Order, ¶ 32, A. 57) that the basis for the finding was the union's failure to give 60 days' notice of the proposed termination of the contract under 8(d) of the Labor Management Relations Act. 8(d) is a technical provision unconnected with the issues in the strike.

** Dr. Melody has been an associate professor of communications economics at the School of Communications of the University since 1971, and prior to that (1966-1970) was a senior economist at the Federal Communications Commission (A. 391-392).

the strike—acted in opposite directions to increase Telco's unemployment insurance tax while greatly decreasing its payroll expenses as it continued to receive revenues. Dr. Melody's "ballpark" (Tr. 710) estimate was that the total in wages not paid during the strike was $199 million for the New York Telephone Company and $231.5 million for the four plaintiffs combined (A. 392-394). The wages not paid by Telco summed to approximately $86 million *after* subtraction of overtime and other expenses incurred above the norm during the strike* (A. 394). This amount was greater than the benefits paid by an enormous margin.

3. The Statistics

Petitioners allege that the challenged provision has had a substantial and prohibited impact on strikes and settlements. This must be determined by objective data, not by assumption or by "truisms".

What are the statistics? As shown by Dr. Samuel A. Richmond, who is Dean of the Graduate School of Management of Vanderbilt University, a former Director of the American Statistical Association and author of a leading text on statistical analysis,** New York has a *shorter* average strike duration than the average for other States (A. 291, Tr. 1374). Petitioners dealt with this by arguing that it is only strikes of over eight weeks which are "lengthened"

* The effect of the strike on revenues was very minor, according to Telco data (Tr. 701, 702, Defs. Exs. 100, A. 276-290).

** (A. 475-477). At the time of trial, Dr. Richmond was a professor of economics and statistics at the Columbia University Graduate School of Business. His study of the period from 1965-1974 rebutted petitioners' witness Dr. Lewis Perl's analysis of a five year period. Dr. Perl subsequently reported the same statistical results as to the ten-year data which had been set out by Dr. Richmond. Defs. Exs. 113-A and 113-B (A. 291-293). The District Court did not mention Dr. Richmond or his testimony in its opinion.

because of unemployment insurance payments. However, the data for this category are equally unhelpful for petitioners' purposes. When strike duration statistics are analyzed by state *and industry,* the data show that the average strike duration for all industries in the over-eight-week group is 14.80 weeks (A. 479). Those industries which in all other States had longer strikes than this average had *shorter* strikes in New York (A. 481, Defs. Ex. 122-A, A. 295-296).*

Dr. Richmond also tested Telco's claim (A. 470-471) that unemployment compensation produces a different strike duration pattern in States paying it than in those which do not pay it. He compared statistics for New York and Rhode Island, the only States which have laws providing for payment of unemployment insurance to striking workers after an initial suspension period, with those of other States. See *Grinnell* v. *Hackett,* 475 F. 2d 449 (1st Cir. 1973), at 459. Far from demonstrating any common pattern among the States with the law in question, the data show that for a ten-year period in all four categories, New York and Rhode Island act in opposite directions when compared separately to all other States: where New York is less than "all others," Rhode Island is greater, and vice versa.**

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* Omitting the industry factor is a less exact method. *Cf. Grinnell Corp.* v. *Hackett,* 475 F. 2d 449, 459 (1st Cir.), *cert. den.* 414 U.S. 858, 879 (1973). The result under petitioners' method of analyzing the data by State without the industry breakdown, also fails to support their claims. New York is sixth out of 50 in duration over a 10-year period (and virtually the same as the seventh state Virginia), and Rhode Island (whose statute is like New York's) is 29th. (Defs. Ex. 113-B, A. 292-293).

** Comparing the average duration or percentage of strikes in New York with the average of "all other" States combined, Dr. Richmond found that New York has 1) shorter strikes, 2) shorter strikes of eight weeks or less, 3) longer strikes of more than

(footnote continued on following page)

Although Telco had itself introduced separate statistics on Rhode Island, it argued (Tr. 1346) that there were too few strikes there from which to draw comparisions, and proceeded to add the New York and Rhode Island figures together. This had the effect of "submerging the Rhode Island data and causing us to lose exactly what we are looking for, namely, any evidence of a common pattern."*

Thus, Telco's theory that strike duration is affected by New York's payment of unemployment benefits to striking employees after an eight week suspension and waiting period runs counter to the data in every category, whether New York is compared alone against "all others," or evaluated under Telco's "common pattern" claim (A. 477-482; Tr. 1381-1382, 1390, 1393).

(footnote continued from preceding page)

eight weeks, and 4) a higher percentage of strikes under eight weeks. (Tr. 1374, Defs. Ex. 113-A, A. 291, Plaintiffs' Exhibit [hereinafter "Pls. Ex."] 407.) Rhode Island's duration figures show a contrary pattern. (A. 472-473, Defs. Ex. 113-A, A. 291, Pls. Ex. 407, A. 246.) New York's duration differs from Rhode Island's to a statistically significant extent in the second and third categories (A. 472-473). When New York and Rhode Island are compared on Defs. Ex. 113-B, which sets out each state's average duration of strikes of over eight weeks, they again relate in opposite ways to the States which do not have this kind of unemployment insurance law (A. 292-293). Petitioners' witness Dr. Perl conceded the correctness of these conclusions (A. 470-473).

* (Testimony of Dr. Richmond, A. 481). He noted further that there were 350 strikes in Rhode Island for the 1965-1974 period, 46 of which lasted over eight weeks (A. 478). In virtually any book on statistics, "one will find that thirty is the dividing line between a small sample and a large sample" (A. 478). Indeed, the lack of any effect of the unemployment benefit statute can also be seen in the statistics showing that New York had a smaller proportion of strikes lasting more than eight weeks than "all others" and Rhode Island had a larger proportion than "all others"—Rhode Island had *350* strikes with which to calculate this result (Defs. Ex. 113-A, A. 291).

Petitioners' brief avoids the subject of strike length statistics, although strike duration would be precisely the area where the "significant impact" generally alleged by Telco would be seen—if the New York law created such an impact. The only reference to the data in petitioners' brief (p. 15) is a reiteration of their witness Dr. Perl's assertion that without the unemployment insurance law, 933,000 fewer man-days would be lost each year, "which would constitute a 15% reduction in man-days lost due to strikes in New York." This assertion is mathematically incorrect even under petitioners' own theory. Telco alleges that unemployment insurance payments cause earlier settlements of strikes which would otherwise last 8 weeks (Tr. 1239-1241); these strikes are thus shorter than they would have been. There is, therefore, no net loss of man-days even under petitioners' rationale.

Petitioners' entire approach is grounded on the idea that without public subsidies, workers will be unable to "meet their ongoing needs" for any substantial period of time during a strike (A. 330). But strike duration statistics have no correlation to the granting of public benefits of any kind. 12.91% of all strikes in States outside New York and Rhode Island go beyond eight weeks, and have a mean duration of 15.0 weeks (Defs. Ex. 113-A, A. 291). How do liquid assets materialize for the employees engaged in these long strikes? Welfare payments do not provide the answer to this question. The majority of States grant General Assistance to strikers (Pls. Ex. 261, pp. 14-15). However, some of the States where the average length of strikes of over eight weeks is exceptionally high, provide *neither* unemployment insurance, nor assistance to unemployed fathers (AFDC-U) nor General Assistance to strikers. South Carolina, Louisiana, and North Carolina, for example, which do not grant any of these three forms of public benefits, have strikes with an average length of

16.673, 15.228, and 16.882 weeks respectively, in the over-eight weeks category.*

Thus, workers in the long strikes in States outside of New York and Rhode Island can continue for 15.0 weeks—and more than 15.0 weeks in States that provide no welfare assistance—utilizing alternate sources of income. Such alternatives would also be available from the outset of the strike. Therefore, the key determinant of the employees' decision to strike or return to work is the issue at stake. Where the issues are intractible, workers will maintain a strike and find sources of income regardless of the "relatively small" liquid assets they may have, or the State in which they reside.

This was the testimony (A. 431-432, 451-452, 470) of Dr. James W. Kuhn, Vice Dean of the Columbia University Graduade School of Business, who has been a professor of industrial relations on the Columbia faculty for more than 20 years. He was also senior staff economist for the Council of Economic Advisors, which advises the President of the United States on all economic matters of national importance, and reported to the President weekly and almost daily on industrial relations and collective bargaining developments (A. 421-423).**

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* Defs. Ex. 113-B (A. 292-293), Pls. Ex. 408 covering a ten-year period. The States of South Carolina, Louisiana, and North Carolina do not grant unemployment benefits during strikes (Defs. Ex. 1, A. 248-251; N.C. Gen. Stat. § 96.14(5), Repl. 1975), nor AFDC-U (Pls. Ex. 261, p. 245) nor General Assistance, which is limited to the aged, handicapped or mentally ill (14 S.C. Code § 71-131 [1962], 14 S.C. Code § 71-131.1 [1975 Supp.]); 24 La. Rev. Stat. Ann. § 46.464 (1950); N.C. Gen. Stat., Vol. 3A (1975 Repl.), § 108.62). North Carolina does not prohibit the use of solely county funds for other programs. As to AFDC (as distinct from AFDC-U) it is restricted to families with disabled or absent fathers and is therefore not useful to strikers. Pls. Ex. 261, p. 11.

** Dr. Kuhn served both under President Johnson and President Nixon (A. 422).

Dr. Kuhn found that if a strike continues for more than eight weeks a particularly intractible issue must be at stake, since the employees could not generally achieve enough in an eventual settlement to make the strike worthwhile in monetary terms (A. 470). His study and classification of strikes by the issues that caused them led him to recognize that it is the nature of the issue that is crucial to the strike's length (A. 429-431).* Objective data, such as evidence on strike duration and wage rates, do not support the opinions quoted by Telco (A. 449).** He concluded, based on the evidence he has seen, that the payment of unemployment benefits after an eight week waiting period will be one factor among many (A. 465) and has no effect on the resolution of strikes (A. 432).

Petitioners presented no data to show that settlements in New York are higher than elsewhere. Respondents' data were analyzed by Dr. Kuhn, who testified that the wage trend in New York State over a substantial period of time was lower than the average for other States (A. 425-427). His industry analysis of all the available data covered 9.52% of the industries in which strikes of over eight weeks actually occurred in New York, Rhode Island, and other States (Defs. Ex. 122A, A. 295-296). Rhode Island also has "a clearly lower wage level for 'average gross hourly earnings'" than the other industrial States in the region (Pls. Ex. 317, p. 12).

In summary, the data on behavior—how long do employees in fact strike, what settlement levels are in fact achieved—show that New York's law has no significant impact on the outcome of collective bargaining.

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* The same approach has been utilized by Dr. Derek Bok, President of Harvard University, and Professor John Dunlop (A. 429-430).

** Dr. Kuhn noted that since the publication of his last book, computer technology had made it possible to develop more accurate statistics and to estimate the weight of various factors in collective bargaining (Tr. 1225-1226).

4. Newspaper Clippings, Tapes, and Other Statements of Opinion

Petitioners submitted at trial an assortment of newspaper clippings, letters, and taped messages which they offered as views on unemployment insurance by union representatives or newspaper writers. Even though they were selected by petitioners because of their contents rather than being an objectively developed and random scientific sample,* most of these exhibits were merely administrative advice to union members. As Dr. Mason Haire, professor of psychology and organization behavior in the School of Management of the Massachusetts Institute of Technology (MIT) concluded and reiterated on cross-examination, the great bulk of the material was not an exhortation to "do it, so that the strike will work" but "an administrative service to make sure that the things that are available were known to be available . . ." (A. 379-380, 390-391).

Petitioners' selection of quotes inflates the importance of the topic to the union speakers, who in fact mentioned unemployment insurance in only 3% of the telephone tapes even though they were then in the midst of a bitter strike. As conceded by Telco, Appendix A, p. 2, Pre-trial Order, there were approximately 2,200 such taped telephone messages recorded by CWA locals during the Telco strike alone, of which 142 were introduced by Telco. Of those introduced, approximately 68 dealt with unemployment insurance, and most merely illustrate the point made by Dr. Haire.

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* Petitioners also quote from and cite exhibits (for example, J. Curtis Counts' statements, p. 12) without advising this Court that these exhibits were not admitted in the District Court for their truth, or as expert opinion, but only for the "limited purpose" of showing that the statements were made (Tr. 235-237). Pls. Exhs. 366, 236.

An opinion survey presented by petitioners resulted in contacting only eight people who had ever been on strike (A. 356-357, Tr. 416), and their answers were not tabulated separately for purpose of comparison. Dr. Haire remained unconvinced after reading the survey that a public opinion poll that votes on whether unemployment insurance prolongs strikes is the proper method of arriving at the truth on that question (Tr. 610-611). "If I were charged somehow with determining the appropriateness of the New York State UI Law, I would certainly want to study the behavior rather than the opinions" (Tr. 603).*

Summary of Argument

Since the National Labor Relations Act contains no provision prohibiting or even referring to unemployment insurance programs such as New York's, the inquiry must turn to other indicia of congressional intent. The purpose of Congress is "the ultimate touchstone". *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L.Ed. 2d 443, 450 (1978).

The question of eligibility for unemployment benefits was addressed in Title IX of the Social Security Act. This law was passed within five weeks of the National Labor Relations Act by the same Congress sitting at the same session. It created a comprehensive joint federal-state program, and

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* Examination of actual data is crucial. For example, petitioners claim (p. 13) that unemployment benefits influenced a national strike against General Electric. This runs counter to the votes cast by the International Union of Electrical Workers locals on whether to accept GE's contract offer. Two New York locals voted "yes" on the contract and 3 locals voted "no". On the other hand, in North Carolina, Florida, Missouri and Minnesota, where unemployment benefits were not available to the strikers, the majority voted "no" on the contract. Moreover, in Rhode Island, where strikers may qualify for benefits, both locals chose to ratify the contract and return to work. Defs. Exs. 74 and 75. Thus, the data on voting behavior refutes the opinion of the quoted union spokesman and petitioners' contentions.

established certain uniform national standards governing benefit payments by the States during strikes.

Although Congress considered the question of whether workers involved in an industrial controversy should be eligible for unemployment compensation, it refused to adopt any prohibition against any such payments. "Except for a few [necessary] standards the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." S. Rep. No. 628, 74th Cong. 1st Sess. 13 (1935). Congress was aware of New York's enactment, which predates the National Labor Relations Act and the Social Security Act, and has remained substantially unchanged for more than forty years.

In the field of labor relations, this Court has defined two categories of cases to which the principle of preemption applies. The first concerns the "primary jurisdiction" of the National Labor Relations Board and involves activities arguably within Sections 7 and 8 of the National Labor Relations Act. The second includes cases which focus on the question of whether Congress intended that the conduct involved be unregulated. *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n.*, 427 U.S. 132, 138-140 (1976). However, *Malone* v. *White Motor Corp., supra,* reaffirms that preemption is a matter of congressional purpose, and teaches that the decision not to preempt is particularly evident where Congress itself has invited the States to act. The Social Security Act's elaborate and carefully constructed system of incentives is perhaps the classic example of this type of cooperative federalism.

Because the incentives created by Congress to induce the States to take part in the joint endeavor were so pervasive, the Social Security Act was challenged as usurping State powers. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 593 (1937). This Court, which discussed New York's statute as well as those of four other States (at pp. 587-588, 593-594), rejected this challenge on the grounds that "a wide range

of judgment is given to the several states as to the particular type of statute to be spread upon their books." (301 U.S. at 593).

Efforts to create a legislative bar against striker benefits continued after the passage of the Social Security Act. President Nixon sought to introduce legislation in the 91st Congress which would have required the States to cease granting such benefits. This recommendation was rejected after testimony on the floor of Congress stating that: "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interests of their people." 115 Cong. Rec. 34106 (1969).

Petitioners' preemption argument must fail for an additional reason. The legislative history of the National Labor Relations Act and of each federal enactment governing the payment of various forms of public assistance to striking employees demonstrates that Congress does not regard such payments as incompatible with free collective bargaining. In 1947, for example, the House enacted amendments to the National Labor Relations Act which provided that strikers who received unemployment benefits would thereby forfeit their status and protection under the Act.

The House Minority Report pointed out that the bill "apparently intends to discourage States from paying unemployment compensation to strikers . . . Under the Social Security Act, however, the determination of these matters was advisedly left to the States." NLRB Legislative History of the Labor Management Relations Act, 1947, p. 359. After a House-Senate Conference, the Senate version which did not contain this exclusion was accepted by the Conference Committee and ultimately the Congress.

Further evidence that Congress does not subscribe to petitioners' definition of neutrality in labor-management relations may be found in the Railway Labor Act which, as this Court has repeatedly recognized, protects and promotes collective bargaining. *California* v. *Taylor*, 353 U.S. 553, 559 (1957). Unemployment compensation for railway workers is fully financed by employers and such benefits have been mandated by Congress since the 1930's. 45 U.S.C. §§ 351-367.

This policy of granting public benefits to strikers is also found in the Food Stamp Act of 1964 (7 U.S.C. § 2001, *et seq.*). Congress has repeatedly refused to amend the Act to exclude strikers. In 1971 Congress directed the Secretary of Agriculture to establish "uniform national standards for eligibility" and specifically exempted strikers from disqualification (7 U.S.C. § 2014[c]) since Congress did not want "to take sides in labor disputes." H.R. Rep. No. 1402, 91st Cong. 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News, pp. 6025, 6035.

The study of explicit committee reports, floor debates, pertinent statutory provisions and recent congressional amendments establishes that Congress determined either to provide benefits to strikers or to leave such decisions to the States. As this Court has held:

> "[S]tudy of the various provisions cited shows that when Congress wished to *impose* or *forbid* a condition for compensation, it was able to do so in explicit terms." *Ohio Bureau of Unemployment Services* v. *Hodory*, 431 U.S. 471, 488 (1977). (Emphasis added).

Finally, respondents show that petitioners' request for a refund of unemployment insurance taxes is barred by the Eleventh Amendment because New York's Unemployment Insurance Fund is in no way autonomous from the State, and is composed of tax revenues administered by State officials and defined as State funds by the Legislature and the courts.

ARGUMENT

Introduction

Petitioners contend that the National Labor Relations Act forbids the States to provide unemployment benefits to individuals who are on strike against an employer subject to that Act, on the grounds that it assertedly conflicts with "the national policy promoting collective bargaining free from government interference" (Brief, p. 20). The identical "national policy" was invoked by the employer in *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L. Ed. 2d 443 (1978), in contending that the NLRA preempted the Minnesota Private Pension Benefit Protection Act insofar as it imposed substantially greater obligations to provide pensions than the employer had undertaken in its collective bargaining agreement. In rejecting the preemption claim, this Court held (55 L. Ed. 2d at 450):

> ". . . [W]hether the Minnesota statute is invalid under the Supremacy Clause depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963). . . ."

In ascertaining that intent, it was first determined that the National Labor Relations Act* did not expressly bar the States from regulating collective bargaining pension plans (55 L. Ed. 2d at 451). Next, in determining whether preemption should be implied, this Court examined not only the NLRA but also § 10 of the Welfare Pension Plan and Disclosure Act of 1958. The latter statute was held to be "a far more reliable indicium of congressional intent

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* 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.* (hereinafter, "NLRA").

with respect to state authority to regulate pension plans" (55 L. Ed. 2d at 451). The body of the opinion was devoted to an examination of the language and legislative history of the 1958 Disclosure Act which, in the majority's view, "clearly anticipated a broad regulatory role for the states" (55 L. Ed. 2d at 455). "In the light of this history," this Court ruled, "we cannot hold that the Pension Act is nevertheless implicitly pre-empted by the collective-bargaining provisions of the NLRA." (*Id.*).

The case at bar presents a precisely parallel problem of determining the "intent of Congress". The NLRA policy which petitioners invoke is, as we have noted, the same as that urged unsuccessfully by the employer in *White Motor*. That policy preempts much State regulation of the countervailing forces in a strike or lockout, even as it preempts much regulation of the terms agreed upon in collective bargaining. The cases cited by petitioners, which were also those relied upon by the employer in *White Motor*, establish no more than this generality. Since the NLRA does not expressly prohibit the States from paying unemployment benefits to strikers, the inquiry must turn to other indicia of congressional intent.

Even as Congress addressed the question of pension regulation in the 1958 Disclosure Act, so it addressed the question of eligibility for unemployment benefits in Title IX of the Social Security Act. Indeed, while a very few States, including New York, adopted unemployment compensation legislation before Congress acted, the unemployment compensation system which presently exists is generally financed under the mechanism established by federal law, particularly the provisions for federal tax credits and federal funding of state administrative costs.

Thus, we must look to the Social Security Act to determine whether, and to what extent, Congress intended to

preclude the States from exercising their own judgment in establishing eligibility requirements for unemployment benefits. We undertake that examination in Point I of this brief, where it is shown that, as the Court of Appeals correctly concluded, Congress left the States broad freedom to establish eligibility requirements and specifically left them free to implement their own views as to whether strikers should or should not obtain benefits, and if so, under what conditions. In Point II of the brief we demonstrate that the petitioners' preemption argument is erroneous for the additional reason that Congress has consistently regarded the payment of unemployment compensation and other forms of public benefits to strikers as compatible with free collective bargaining.

I. WHERE CONGRESS HAS ESTABLISHED A FEDERAL-STATE PROGRAM AUTHORIZING THE STATE TO LEGISLATE, THE PREEMPTION DOCTRINE IS INAPPLICABLE.

A. The Social Security Act.

(1) The 1935 Passage of the Act.

The Social Security Act, which was passed within five weeks of the NLRA, launched a significant joint federal-state program. It provided a tax on employers in States which did not pass unemployment compensation laws,* and therefore all the States enacted such statutes. Congress established certain mandatory standards governing payment of unemployment benefits during strikes but determined to authorize—without requiring—the granting of unemployment benefits to strikers.**

The legislative history of the relevant provisions, formerly part of the Social Security Act*** and currently titled the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-3309, is extremely revealing. It refutes petitioners' assertion (p. 46) that "Congress did not anticipate that unemployment compensation programs would be ex-

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* 26 U.S.C. § 3301, § 3304. Yearly, the Secretary of Labor reviews, authorizes and certifies that each State plan complies with the mandate of § 3304. He has objected to some New York provisions, but not the section at issue herein (Tr. 766-768).

** This authorization is as much a part of the federal labor scheme as is the NLRA's permission to resort to economic weapons. Petitioners' contention that the field has been preempted by the National Labor Relations Act (p. 20) assumes that Congress failed to understand and provide for the other areas which touch upon labor-management matters. Congressional intentions regarding labor relations are expressed in various statutes, among them the Social Security Act, the Railroad Unemployment Insurance Act, and the Food Stamp Act (See pp. 43-48, *infra*). Cf. *Malone* v. *White Motor Corp., supra.*

*** Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-45.

tended by the states to strikers." In 1934, when Congress had the matter of unemployment compensation under consideration, its study included the question of whether workers engaged in an industrial controversy should be eligible for unemployment compensation. Mr. Edmund Witte, Executive Director of the Presidents' Committee on Economic Security, which had been created by Executive Order 6757 (1934),* recommended the following on behalf of the Advisory Council:

> "B. Types of unemployment not benefited. (1) Unemployment of persons directly engaged in trade disputes for the duration of the dispute.**

Dr. Abraham Epstein, representing the American Association for Social Security and Mr. Noel Sargent, representing the National Association of Manufacturers, made similar suggestions.***

These recommendations were rejected. The Senate Finance Committee Report on the Social Security Act of 1935, in explaining the legislative choices involved, stated unequivocally:

> "Except for a few [necessary] standards the States are left free to set up any unemployment compensation system they wish, without dictation from Washington."****

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* The key role of the President's Committee was recognized in *California Human Resources Dept.* v. *Java,* 402 U.S. 121, 130 (1971), where this Court stated that "[t]he Social Security Act received its impetus from the Report of the Committee on Economic Security . . ."

** Hearings on S. 1130, Committee on Finance, U.S. Senate, 74th Cong., 1st Sess. Report of the Advisory Council to the Committee on Economic Security (Dec. 18, 1934), at 228 (1935), hereinafter "Senate Hearings."

*** *Id.* at 472, 959.

**** S. Rep. 628, 74th Cong. 1st Sess. 13 (1935); see also *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 593 (1937).

These standards provided:

> "(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.*

As indicated by Senator Wagner, the sponsor of the Act and the first witness in hearings before the Senate Finance Committee** "[p]ractically no restrictions" were placed on the types of laws which the States could enact. This reflected congressional recognition that because "our own extent of territory is so great, and our enterprises so dissimilar in far-flung sections," the States should "experiment in 48 separate laboratories."*** See *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937), quoted at p. 32, *infra.*

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* Section 903(a)(5), currently 26 U.S.C. § 3304(a)(5). *Amicus* Rochester Telephone Co. seeks (pp. 19-20) to discount this provision on the theory that it applies only to those who are "entitled" to benefits and not those who should be "denied" benefits This Court came to the opposite conclusion about the same provision in *Ohio Bureau of Unemployment Compensation* v. *Hodory,* 431 U.S. 471, 488, n. 16 (1977), where this section was used to illustrate the point that Congress is able to forbid or impose conditions for receipt of unemployment insurance if it determines to do so.

** Hearings before the Committee on Finance, U.S. Senate, 74th Cong., 1st Sess. on S. 1130 (January 22 to February 20, 1935), at page 5.

*** *Id.* at page 3.

While this general policy is controlling, it is noteworthy that the New York statute predates the enactment of the NLRA and the Social Security Act, and that Congress was aware of the State's provision (Pet. 11a-12a). From the outset, the law provided a seven-week suspension period* during which no one who was unemployed as a result of an industrial controversy would receive unemployment benefits; after the expiration of this period, benefit rights could be accumulated, subject to the requirement of availability and capability to work and other eligibility prerequisites.

Faced with the fact that the challenged provision has been substantially unchanged since its inception, petitioners argue (pp. 45-50) that 1) experience rating was not "introduced" until years after the NLRA was enacted 2) benefit rates were lower in 1935 and that 3) benefit periods have been extended since that time. This argument, even if historically accurate, would only show that New York exercised the freedom which Congress gave it, rather than that the State exceeded that freedom. However, it is not accurate.

"Experience rating"—which relates the employer's tax rate to the number of his workers currently unemployed—was already listed on the face of New York's enactment as under study, with a further report to the Legislature on its practicability required no later than March 1, 1939.** Indeed, Congress created tax incentives for State adoption of experience rating provisions (which had already been enacted by Wisconsin).***

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* The waiting period applicable to all claimants, and which is added on to the suspension period for strikers, was shortened by two weeks in June, 1942. 1942 N.Y. Laws, Chap. 640, § 504.

** 1935 N.Y. Laws, Chap. 468, § 518(4).

*** See Senate Report 628, to accompany H.R. 7260, 74th Cong. 1st Sess. (1935), p. 3; §§ 909, 910, Social Securiy Act, August 14, 1935, 74th Cong. 1st Sess., Ch. 531. W.S.A. § 108.18.

The 1935 Congress would also have been aware that some strikes would be of extended duration; 4.9% of the nation's strikes in that year exceeded 3 months, and these disputes involved 29.0% of the total man-days lost as a result of strikes.* In 1928, 8.2% of strikes had been at least 3 months in duration.**

In citing the changed benefit rates, petitioners have apparently forgotten the factor known as inflation. The buying power of $15.00 in 1935 was equivalent to $43.55 in 1971.***

In short, the 1935 Congress had the relevant facts. There is no basis for presuming that it did not understand them.

(2) The District of Columbia Law and the Social Security Board Draft Bills.

Petitioners' citation (p. 49) of the District of Columbia's law, in which Congress acting as a local legislature ex-

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* United States Department of Labor, Bureau of Labor Statistics, Bulletin 651, "Strikes in the United States." 1880-1936 (August 1937), pp. 52-53.

** *Ibid.*

*** Consumer Price Index for Urban Wage Earners & Clerical Workers (U.S. City Average, all items index) Department of Labor, Bureau of Labor Statistics. See also Registered Unemployment, Employment & Average Earnings of Workers covered by New York State Unemployment Insurance Law, 1939-1969; Table D, p. 27. The alterations in benefit periods have resulted from federal enactments providing for extended benefits (50% federally financed) and supplemental benefits (100% federally financed). (Tr. 772-773). No agency of the federal government has attempted to cease the payment of supplemental benefits to employees who are on strike (Tr. 774-775). § 601 of the New York Unemployment Insurance Law provides for extended benefits upon a determination of the United States Secretary of Labor or of the Industrial Commissioner in accordance with regulations of the United States Secretary of Labor. See Regulations of the Secretary of Labor to Implement the Federal-State Extended Unemployment Compensation Act of 1970, §§ 615.13, 615.14(b).

cluded strikers from receiving benefits while a labor dispute is in "active progress",* does not aid Telco's position. Although Congress clearly had the possibility of striker eligibility in mind when it passed the D.C. bill and the Social Security Act within the same month, the national legislation contained no restriction on such eligibility. This exemplifies a fundamental point herein. Had Congress wished to assume the role of a State legislature, it might have enacted provisions different from those chosen by New York and other States. But it did not assume this role. Instead, it left the choice of programs to the States for determination.**

Nor are the draft bills of the advisory Social Security Board evidence of federal preemption. Petitioners imply that these bills were recommendations to the States as to which approach the Board (and Congress) wished them to utilize. However, on the face of the bills cited (petitioners' brief, p. 48) is a statement by the Board that the provisions set out are

> ". . . merely suggestive and are intended to present the various alternatives that may be considered in the drafting of state unemployment compensation acts. Therefore, they cannot properly be termed 'model' bills or even recommended bills. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and *the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted.*"*** (emphasis added)

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* Act of August 28, 1935, ch. 794 S10(a), 49 Stat. 950.

** *Cf.* the 1969 testimony of the Chairman of the Ways and Means Committee concerning the New York statute, stating that "I would not vote for it," but that the State has a right to make its own judgment. 115 CONG. REC. 34106.

*** Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, prepared by the Social Security Board, Washington, D.C. January 1936.

Indeed, in *Ohio Bureau of Unemployment Services* v. *Hodory* 431 U.S. 471, 485 (1977), this Court declared, after citing the above-quoted cover page, that it would be "most reluctant to read implications of the draft bills into the Social Security Act."

Moreover, petitioners erroneously state (p. 48) that the draft bills "expressly denied benefits to strikers" and that "The striker disqualification contained in the model bill was followed in virtually all of the states." To the contrary, the cited bills permitted strikers to receive benefits where there was no substantial curtailment of the employer's business ("stoppage of work"). *Cf. Kimbell* v. *New Mexico Employment Security Commission,* 429 U.S. 804 (1976). Although three States whose laws predated the Social Security Act had precluded strikers from eligibility,* the draft bills did not adopt these formulations.

Amicus Dow Chemical Co. *et al.* contends (p. 26) that draft bills were utilizing the term "work stoppage" as it was understood under the British system, and that under that system strikers were not paid benefits during industrial controversies unless they were replaced. In fact, this was not the British system. See *Ahne* v. *Department of Labor and Industrial Relations,* 53 H. 185, 188, 489 P. 2d 1397 (1971):

> ". . . The British courts, however, quickly interpreted the phrase 'stoppage of work' to refer not to the cessation of the workmen's labor, but to a stoppage of work carried on in the factory . . . Ministry of Labor, Analytical Guide Unemployment Insurance Code 7,

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* Laws of N.H. January Session 1935, Ch. 99, An Act Providing for the Establishment and Administration of Unemployment Compensatiton P.L. 179-A, § 24; Laws of Utah 1935 Twenty-First Regular Session. Unemployment Reserve Law, Ch. 38, § 8(a)(3); Laws of Washington Twenty-Fourth Regular Session, 1935, Ch. 145 Unemployment Compensation Act § 7(4).

Part III S43 (1939 ed.); British Unemployment 1408/1927, BU-495 (1927); British Unemployment 609, BU-493 (1921)."

This is also made clear in the source quoted by *amicus* Dow (p. 28),* which states:

> "It is not a disqualification that employment has been lost through a trade dispute unless the dispute involves a stoppage of work, and a 'stoppage of work' refers primarily not to a cessation of the workman's labour, but to a stoppage of the work carried on in the . . . premises at which the workman is employed."**

The portion quoted by *amicus* merely points out that the replacement of employees was looked to as evidence that no stoppage of work had occurred.*** Such evidence would not be necessary in the case of an automated industry such as a telephone company.

Contrary to *amicus'* contention (p. 26), the Telco strikers would not have been disqualified under the "stoppage of work" bills. It is ironic that the instant case was brought in New York by plaintiffs whose striking employees would have been paid unemployment benefits in the majority of States (Defs. Ex. 1, A. 248-251), for example those utilizing the option approved by this Court in *Kimbell, supra.* And in these other jurisdictions, there is no special suspension period for strikers—they are paid from the outset.

Petitioners' final argument as to the 1935 Social Security Act provisions (p. 47) is that compensation of involuntary unemployment was the sole congressional purpose. Such an

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* Hughes, Marsile, J., "Principles Underlying Labor-Dispute Disqualification" (Social Security Administration, July 1946).

** *Id.* at p. 22.

*** *Id.* at pp. 25-26.

approach had been recommended by Edmund Witte, who favored the inclusion of the following provision:*

> "(3) Voluntary quit without reasonable cause may be uncompensated entirely or for such period as the plan may designate."

Congress did not adopt this provision. It may be noted that a voluntary-involuntary differentiation is not the decisive factor in the various unemployment statutes. Employees who voluntarily leave their employment for good cause are eligible in all States. Pursuant to federal requirements (26 U.S.C. § 3304[a][5]), the unemployed worker may not be denied benefits if he chooses to refuse employment where a labor dispute is in existence or where the wages or conditions offered are less than those prevailing in the same local industries.

At the same time, he may be *denied* compensation even if his unemployment is entirely involuntary. *Ohio Bureau of Unemployment Services, et al.* v. *Hodory, supra.* Statutes which do not compensate locked-out employees are not the only example of such denials. Some States do not give benefits to those who are members of a "grade or class" of workers directly interested or participating in a labor dispute. If the plant or establishment closes down as a result of this dispute, an employee who is entirely opposed to the strike will receive no compensation if he is in the same class as those participating.

(3) Subsequent Legislative Developments.

Efforts to create a legislative bar against striker benefits continued after the passage of the Social Security Act. President Nixon sought to introduce legislation in the 91st Congress which would have amended FUTA to include a "requirement that [the] practice of paying unemployment

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* Senate Hearings, *supra*, at 228.

insurance benefits to workers directly engaged in a strike be discontinued.'"*

This recommendation was rejected after testimony on the floor of Congress. The Congressional intent was unequivocally stated:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. . . . For example, there are . . . States . . . which will pay unemployment benefits when employees are on strike . . . [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want."**

(4) The Preemption Doctrine.

Petitioners' invocation of the preemption doctrine must fail. In the field of labor relations, this Court has defined two categories of cases in which it applies the principle of preemption. The first includes cases concerned with the "primary jurisdiction of the Board," involving activities arguably "within the compass" of §§7 and 8 of the NLRA.*** The second encompasses cases which focus upon

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* Message from the President, 91st Cong., 1st Session, July 8, 1969.

** Statement of Rep. Wilbur Mills, Chairman of the House Ways & Means Committee, 115 Cong. Rec. 34106 (1969); H.R. Rep. No. 612, 91st Cong., 1st. Sess. (1969)

*** See e.g. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), erroneously described by petitioners (p. 28) as "stand-[ing] four square against" the decision below, apparently because it contains general statements that States may not pass any unemployment compensation law which "frustrates federal legislation." In *Nash*, Florida refused to pay unemployment compensation to a person who had filed an unfair labor practice charge against a former employer. Section 8(a)(4) of the NLRA *explicitly* provides that it is an unfair labor practice for an employer to discriminate against an employee because he or she has filed charges. This Court held that the statutory rule in the NLRA prohibiting punitive action by employers and unions against anyone making charges also applied to the States.

the question of whether Congress intended that the *conduct involved* be unregulated and left "to be controlled by the free play of economic forces," *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n.*, 427 U.S. 132, 138-140 (1976).*

But *Malone* v. *White Motor Corp., supra,* reaffirms that preemption is a matter of congressional purpose, and teaches that the decision not to preempt is particularly evident where Congress itself has invited the States to act. As we have shown, Congress made clear in the Social Security Act its intention that the States develop an unemployment insurance program and determine, subject to narrow restrictions set out in the Act, who should be eligible for benefits and under what terms.

Petitioners seek to distinguish *White Motor Corp.* (p. 34) by contending that there "Congress had affirmatively and clearly indicated"—presumably in the disclaimer provision** of the Welfare and Pension Plans Disclosure Act

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* In *Lodge 76, IAM* the State Commission had ruled that the refusal of employees to work overtime during the negotiation of a new contract was *an unfair labor practice* under state law. This Court found the State's action improper because it had entered into "the substantive aspects of the bargaining process," sought to pick and choose which economic devices of labor and management would be "branded as unlawful," and to "police the use" by employees and employers of peaceful methods of applying economic pressure (427 U.S. at 149, 155). New York's statute by contrast does not regulate the conduct of the parties to an industrial controversy, and provides no power to "police" them. New York refuses to dictate any substantive terms in labor contracts, and does not "brand as unlawful" any particular economic tools labor and management may use in their industrial disputes.

** § 10(b) of the Act provides:

> "The provisions of this Act, except subsection (a) of this section and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law."

("WPPDA")—that the States could "regulate pension plans." In actuality, the thrust of the disclaimer provision is negative—it does no more than indicate that Congress expected that the States would pass regulations in this area and had no objection.

If there is a meaningful difference, the Social Security Act more clearly encouraged the States to act than did the WPPDA, for in the Social Security Act, Congress provided for an elaborate system of incentives, including a 90% tax credit and federal funding for administration of the unemployment insurance program—all designed to induce the States to enter the field. This is more than permission to act. It is authorization engendered by an urgent congressional program requiring federal-state cooperation. The New York statute was authorized by the Social Security Act—by a Congress already aware of its existence—as part of this cooperative endeavor.

Because the incentives created by Congress to persuade the States to take part in the joint endeavor were so pervasive, the Social Security Act was challenged as usurping State powers. *Steward Machine Co.* v. *Davis, supra.* This Court, which discussed New York's statute as well as those of four other States (at pp. 587-588, 593-594), rejected this challenge on the grounds that "a wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." (301 U.S. at 593).

B. The New York Statute.

The provision at issue, Section 592.1 of the New York Unemployment Insurance Law, prohibits the payment of unemployment benefits for the initial seven weeks after the commencement of a strike, lockout, or other industrial controversy. It permits the accumulation of such benefit rights after this suspension period, subject to the requirement of availability and capability to work and other eligibility prerequisites. § 590.9 provides in addition a waiting period

which is equivalent to one week pursuant to the definition in § 523, applicable to all claimants.

This section was drafted prior to the enactment of the NLRA by a tri-partite Committee composed of representatives of employer and labor groups as well as members of the public. The Committee concluded (Tr. 496, 498, 510-511) that it is often impossible to distinguish between strikes and lockouts.* If a company with rising profits offers its employees $2.00 an hour less under a proposed new contract than they were receiving under the prior contract and they refuse to work for this wage, is this a strike and therefore the fault of the worker? If employees reduce their productivity substantially and the employer refuses to continue his business operation, is this a lockout and therefore the fault of management? The possibility of such manipulation (Tr. 516-518) led the Committee to recognize that New York's statute should require no administrative adjudication as to the cause of the industrial dispute or the nature of the participants.**

Petitioners' analysis of the statute (pp. 30-31) is based on the misapprehension that strikers have been found to be unemployed through their own "fault"*** and that therefore payments to them subvert the purpose of the statute. However, a determination of "fault" is precisely what the Legislature did *not* authorize in industrial disputes.

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* Albert Belman, Director, Work Stoppage and Union Membership Projects, Bureau of Labor Statistics, United States Department of Labor, testified that often the information submitted by the parties to a labor dispute as to why the employees are not working is diametrically opposed (Tr. 679).

** There are States which make such distinctions. However, it is the opinion of unemployment insurance administrators from the various jurisdictions that New York's statute is operationally more effective (Tr. 533).

*** Another variation of this argument proffered by *amicus Dow Chemical Co.* (p. 10), is that a striker is "voluntarily" unemployed and should therefore be ineligible. This contention is answered *supra* at p. 29.

In interpreting the provision, the New York Court of Appeals has held:

> "Whether . . . [a] work stoppage was the fault of the employer or employee, was of no consequence in determining, first, that unemployment benefits were to be suspended during the early stages of the strike and, second, that they were to be paid thereafter if the workers remained idle." *Matter of Heitzenrater,* 19 N Y 2d at pp. 1, 7, —— N.Y.S. 2d —— (1966).*

See in accord, *Matter of Ferrara* (*Catherwood*), 10 N Y 2d 1, 8 (1961); *Matter of Burger* [*Corsi*], 277 App. Div. 234, 236 (3rd Dept. [1950]), affd. 303 N.Y. 654 (1951); *Lascaris* v. *Wyman,* 31 N Y 2d 386 (1972). Indeed, § 593 of the New York Unemployment Insurance Law provides that persons unemployed because of a "strike, lockout or other industrial controversy" are deemed to have been separated from their employment for good cause." Nevertheless, such employees are subject to a seven week suspension period beyond the normal one week waiting period prior to eligibility for benefits.

The adoption of this particular plan of insurance benefits for strikers was viewed as a compromise:

> "The industrial controversy provision, reflecting 'the principle of governmental neutrality' (*Matter of Ferrara* [*Catherwood*] 10 N Y 2d 1, 8) represents a compromise of sorts. Faced with the choice of providing either (1) that benefits be awarded to workers, made idle by a strike or any other industrial controversy, from the day after they lost their employment or (2) that benefits be withheld altogether throughout the

* However, no benefits may be paid to strikers even after eight weeks, when [t]he fact and legal issues . . . are clear and uncomplicated, and . . . the conduct engaged in has been expressly declared 'unlawful' by the Legislature." *Matter of Rodriguez* (Presbyt. Hospital-Levine), 32 N Y 2d 577, 582-583 (1973).

> period of their unemployment, the Legislature took a middle course. It enacted subdivision 1 of section 592 to cover *all* cases of unemployment resulting from strikes and other industrial controversies." *Matter of Heitzenrater, supra,* 19 N Y 2d at p. 7.

As is the case with many compromises, the provision has been attacked from opposite directions. A constitutional challenge to New York's eight week suspension and waiting period by employees who were involuntarily laid off when their employer ceased operations because of a strike by a union of which they were not members, was rejected in *Drassenower* v. *Levine,* 48 A D 2d 957 (3rd Dept., 1975), *appeal dismissed* 38 N Y 2d 771 (1975), *cert. den.* 431 U.S. 953 (1977).

Petitioners urge (p. 18) that total denial of unemployment benefits from the outset, regardless of the circumstances, would be true "neutrality."* However, New York's legislative determination directly parallels that of Congress in refusing to disqualify strikers for food stamps. As will be shown *infra,* the reason for this federal provision was the congressional determination not to "take sides in labor disputes." H.R. Rep. No. 1402, 91st Cong., 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News pp. 6025, 6035.**

* In the course of this argument, they imply that Unemployment Insurance Director Harold Kasper agreed with their view. In fact, he steadfastly rejected it (A. 405), pointing out that "after eight weeks positions have hardened and the amount of benefits that would be paid won't settle the strike either way."

** Indeed, the principle of neutrality in the field of labor relations has never been understood to require that the States refrain from passage of any affirmative labor legislation. States have, for example, enacted broad programs to effectuate minimum wage laws, workmen's compensation, and safety and hours laws. *Malone* v. *White Motor Corp., supra.*

After the expiration of eight weeks, the unemployment of a worker who is locked out or on strike is clearly related to the state of the job market. It may be noted that strikers are required to seek and accept temporary jobs (Tr. 764). Special scrutiny is given to those who were employed in demand occupations, such as stenographers and bookkeepers (Tr. 762). A telephone lineman who had other training would be required to accept work within that field (Tr. 765). Union members are aware that this provision will be enforced. See Pls. Ex. 96, a CWA tape directed to members during the TELCO strike: "Regarding the blue slips from the unemployment office . . . You will have to . . . look for a job. Make a personal contact and leave your name. They will be checking the places you looked to see if you did make a personal appearance. You would be required to accept a job offer in your field or related field and within your salary range. This is a required law under the unemployment service."

Petitioners also object to the New York Unemployment Insurance Law on the grounds that it is "employer-financed" (p. 19). All 50 states have employer-financed systems; only three of these collect employee contributions in addition.** Moreover, as was made clear in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 514 (1936), which held in the context of a Fourteenth Amendment challenge that the States have broad scope to fashion their own unemployment insurance provisions:

> "This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he

** Comparison of State Unemployment Insurance Laws, United States Department of Labor, Employment and Training Administration, January, 1978, Ch. 200, § 205, p. 2-1.

> can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him." (301 U.S. at 523).*

Obviously, Congress knew when it inaugurated the social security program that employers would bear the cost of it.

New York's provision of benefits to strikers after eight weeks is grounded in part on "concern for the social and economic well-being of citizens—an interest," as the court below observed (Pet. 11a-12a, n. 5) "which lies well within its legislative powers." See also *Matter of Ferrara (Catherwood) supra.* In *Grinnell* v. *Hackett,* 475 F. 2d 449, 460 (1st Cir. 1973), cert. den. 414 U.S. 858 (1973) the court noted that "the payment of unemployment benefits represents an attempt to assist the striker and his family in meeting obligations previously undertaken."

Another significant purpose of the statute is to cushion the economy. *Steward Machine Co.* v. *Davis, supra.* "This money is not saved. These are hot dollars, they are velocity dollars, they are spread out in the economy; they pay the butcher, baker—I used to say the candlestick maker, but now I say the electric company, and I include the New York Telephone Company." (Testimony of the Director of the Unemployment Insurance Division of New

* The argument that the New York statute violates due process of law because it "exacts contributions for the purpose of making cash payments to employees on strike without just cause" (Brief of petitioner No. 49, Oct. Term 1936, p. 66) was rejected in *W.H.H. Chamberlain* v. *Andrews,* 159 Misc. 124, 286 N.Y.S. 242 (Sup. Ct. Onondaga Cty.), modified, 271 N.Y. 1 (1936), affd. by an evenly divided court, 299 U.S. 515 (1936), reh. denied, 301 U.S. 714 (1937). This Court denied rehearing on the same day as it ruled in *Steward Machine Co.* v. *Davis, supra,* that the States had been given wide discretion by the Social Security Act to determine the particular kind of statute they wished to enact.

York's Labor Department, A. 401, Tr. 838).* See also the testimony of Secretary of Labor Perkins in support of the original Social Security Act, quoted in *Calif. Human Resources Dept.* v. *Java, supra,* 402 U.S. at 132-133.

C. The Range of Statutory Options.

The vast majority of the States have rejected the view that unemployment compensation must be withheld during industrial controversies, or should be paid only to employees who have been formally "locked out" by their employers.**

In many States, benefits are paid to employees in certain categories from the outset of a strike. The option chosen by New York is unique in *barring* payments during the first eight weeks of an industrial controversy, thus eliminating approximately 89% of strikes from the payment category completely.*** This is the percentage of strikes which are shorter than eight weeks.

This Court has already sustained the right of the States to adopt one of the possible approaches—the granting of benefits if the employer continues to operate during a strike. See *Kimbell, Inc.* v. *Unemployment Security Commission of New Mexico, supra.* A considerable range of statutory schemes have been established, of which New York's and New Mexico's represent two options. Adoption of petitioners' rationale, however, would require the federal courts to evaluate the laws not modelled on New Mexico's to determine which are "best."

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* The State's interest in maintaining this program is in itself a valid basis for rejecting petitioners' preemption claims. *Cf. Grinnell* v. *Hackett, supra.*

** See Defs. Ex. 1, prepared by the United States Department of Labor, summarizing all the statutes (A. 248-251).

*** Defs. Ex. 113-A.

The subjectivity of this exercise would be endless.* Should States be allowed to pay if the dispute is caused by a hazardous condition?** The employer's failure to conform to his own collective bargaining contract?*** An employer's violation of the labor law?**** Should employees receive benefits if they are not in the grade or class financing the dispute or not directly interested in it, or have been laid off from a *bona fide* subsequent job?*****

While the District Court herein found New York's statute more violative of "federal labor policy" than New Mexico's law (Pet. 51a-53a), the District Court in Hawaii determined after trial that Hawaii's provision (identical to New Mexico's law upheld in *Kimbell*) was intrusive because of features not present in New York's enactment:

> "By focusing on the *effect* of collective action by employees upon the employer's business operations when the parties are in the throes of a collective bargaining conflict, it impinges upon 'the very subject addressed by Congress in NLRA' and therefore is preempted, unless Congress has provided otherwise." Footnotes omitted). (Emphasis added).******

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* Testimony by nationally known experts concerning statistics directly countering petitioners' theories (see pp. 3-5, *supra*), was disregarded by the District Court, which accepted a "truism" about the payment of benefits (Pet. 28a, 38a).

** 26 Me. Rev. Stat. Ann. § 1193 (amended 1977).

*** E.g. W. Va. Code § 21A-6-3 (amended 1976); N.H. Rev. Stat. Ann. 282:4 (amended 1973).

**** E.g. Ariz. Rev. Stat. Ann. § 23-777 (amended 1952); Rev. Codes of Mont. § 87-106 (amended 1977).

***** Fla. Stat. Ann. § 443.06 (amended 1972); Nev. Rev. Stat. 612-395 (1955); Conn. Gen. Stat. Ann. §§ 31-236 (amended 1977), 31-236(a) (1969); Ann. Laws of Mass. C-151A § 25 (amended 1976); Mich. Comp. Laws Ann. § 421-29 (amended 1975).

****** *Hawaiian Tel. Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. 275, 284 (D. Hawaii 1976), *appeals docketed* (9th Cir. Mar. 19 and May 12, 1976, Nos. 76-1584, 76-2056), *cert. den.* 46 U.S.L.W. 3600 (1978).

Such contradictions occur when courts are asked to make judgments which are essentially legislative in nature. Since Congress intended to authorize variations in State law as to the eligibility of strikers for benefits, the nature of that determination may not be altered by introducing a requirement that each variant be judicially approved.

II. SINCE CONGRESS DOES NOT REGARD THE GRANTING OF UNEMPLOYMENT BENEFITS TO STRIKERS AS INCONSISTENT WITH FREE COLLECTIVE BARGAINING, IT HAS REJECTED A UNIFORM NATIONAL STANDARD WHICH WOULD BAR SUCH PAYMENTS.

The claim that the granting of unemployment benefits to strikers is incompatible with federal labor laws cannot be resolved by economic theories. It is a question of congressional intent. The unanimous decision of the Second Circuit contains a complete analysis of that intent. The legislative history of the National Labor Relations Act, and of each federal enactment governing the payment of various forms of public assistance to striking employees, demonstrates that the congressional view of neutrality differs sharply from that of petitioners. Commencing with the virtually simultaneous passage of the NLRA and the Social Security Act in 1935, Congress has consistently shown that it does not regard a uniform national standard which would bar striker eligibility for benefits as essential to the federal regulatory scheme.

A. The National Labor Relations Act.

Contrary to petitioners' assertion (p. 46) that the attention of Congress was not on state unemployment insurance statutes at the time that it created the national labor policy, the NLRA did not spring forth from its own separate and unique Congress. The original National Labor Relations Act (Wagner Act) and legislation establishing a national unemployment insurance program (Title IX of the Social Security Act of 1935) were the products of the same Congress sitting at the same session.* The Wagner Act

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* As shown *supra*, the 1935 Congress spoke through the Social Security Act in establishing a number of restrictions governing payment of unemployment compensation during strikes, but left to the States the decision as to whether to pay benefits to strikers, and if so, under what circumstances.

was enacted on July 5, 1935, and the Social Security Act five weeks later, on August 14, 1935. In fact, Senator Wagner was a sponsor of both statutes.*

There have been persistent efforts to introduce into Congress the restrictions on the States which petitioners are now seeking from the judiciary. In 1947, for example, the House enacted amendments to the NLRA which provided that strikers who received unemployment benefits would thereby forfeit their status and protection as employees under the Act.** The House Minority Report,*** in discussing this provision stated:

> "2. Employee—Section 2(3) redefines the term 'employee.' Under the present act, strikers remain employees so long as the labor dispute is current; under this bill a striker ceases to be an employee if he has been 'replaced by a regular replacement, or has obtained other regular and substantially equivalent employment, or is receiving unemployment compensation from any State.' . . . *The bill apparently intends to discourage States from paying unemployment compensation to strikers by penalizing employees who accept unemployment compensation. Under the Social Security Act, however, the determination of these matters was advisedly left to the States.*" (Emphasis added).

After a House-Senate Conference, the Senate version which did not contain this exclusion was accepted by the Conference Committee and ultimately the Congress.****

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* 79 Cong. Rec. 9283 (1935).

** NLRB Legislative History of the Labor Management Relations Act, 1947 (hereinafter "1 NLRB Legislative History"), pp. 161, 303-4; H.R. 3020, 80th Cong., 1st Sess. (1947).

*** NLRB Legislative History, *supra*, p. 359.

**** H. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), 1947 U.S. Cong. Service 1135, 1137-9.

(footnote continued on following page)

B. The Railroad Unemployment Insurance Act.

Telco's thesis that Congress regards the payment of unemployment benefits to strikers as inconsistent with free collective bargaining collides with the fact that Congress has directly mandated both the right to strike and the payment of unemployment compensation to railroad workers. Specifically, the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-367, grants benefits to strikers unless the Railroad Retirement Board finds that the strike was commenced in violation of the Railway Labor Act or in violation of the established rules and practices of a *bona fide* labor organization of which the claimant was a member. (45 U.S.C. § 354 [a-2] [iii]).* The legislation was enacted despite the opposition of the railroads, whose representative urged that the railroad workers would be granted benefits more favorable than existed under most state laws.**

(footnote continued from preceding page)

It is clear that the intent of Congress may be inferred from the history of the House and Senate bills and the reports relevant to them. See, e.g., *Malone* v. *White Motor Corp.* —— U.S. ——, 55 L.Ed. 443 (1978); *Ohio Bureau of Employment Services* v. *Hodory, supra; Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 288-290 (1960), where the Court looked both to the Senate and House drafts and Conference Reports in determining the intent of Congress.

* New York similarly refuses unemployment benefits to employees engaged in strikes which are illegal under any New York statute. See *Matter of Rodriguez* (Presbyt. Hospital—Levine) *supra*, 32 N Y 2d at 582-583.

** Hearings before a Subcommittee, House Committee on Interstate and Foreign Commerces, 75th Cong., 3rd Sess. at p. 133 (1938).

In 1961, Congress passed the Temporary Extended Railroad Unemployment Insurance Benefits Act of 1961, 45 U.S.C. §§ 401-404. The purpose of this legislation was to grant additional unemployment payments on a temporary basis to unemployed railroadmen who had exhausted their right to benefits under the Railroad Unemployment Insurance Act between certain dates (Senate Report No. 72, U.S. Code Cong. and Admin. News, 1961, p. 1507). Strikers and those laid off are not distinguished in this provision.

Congress has recently amended the Railroad Unemployment Insurance Act.* 45 U.S.C. § 352(a) provides that an individual who is unemployed because of a strike is entitled to receive unemployment benefits following an initial seven *day* disqualification period. Section 352(a) of the federal act also provides a daily benefit rate equal to 60 percent of the employee's daily salary but *not less* than $25.00 per *day* for periods after June 30, 1976. Finally, 45 U.S.C. § 352(h)(1) provides for an extended benefit period.

This Court has repeatedly stated that the purpose of the Railway Labor Act ("RLA") is to foster free collective bargaining. See *California* v. *Taylor*, 353 U.S. 553, 559 (1957):

> "On numerous occasions, this Court has recognized that the Railway Labor Act protects and promotes collective bargaining. *Virginian R. Co.* v. *System Federation No. 40*, 300 U.S. 515, 548-549, 553; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300, 302; *Order of Railroad Telegraphers* v. *Railway Express Agency Inc.*, 321 U.S. 342, 346-347; *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 202; *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, 233, 235."

Amicus Rochester Telephone Company contends (p. 25) that "Unemployment Insurance is not awarded on the basis of need and it offends the policy of neutrality by requiring the employer to subsidize the very people with whom it is supposed to be freely bargaining." Congress does not agree. Unemployment compensation for railway workers is financed wholly by employers,** and such benefits have been mandated for more than 40 years.

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* Aug. 9, 1975, Pub. L. No. 94-92, Title 1, § 1(c)-(e), 89 Stat. 461.

** 45 U.S.C. § 359(b).

The "true significance of the RLA here," in petitioners' view (p. 57) is that since Congress has mandated payments to strikers under the RLA, it must have intended to preclude them under the NLRA. Under this rationale, whatever is omitted from federal law is prohibited to the States—a proposition which turns both federalism and the Constitution on its head. It ignores what appears repeatedly in the legislative history of all the relevant statutes, as will be shown below--that Congress has determined either to *require* unemployment compensation during strikes, or to leave the choice to the States.

C. The Food Stamp Act of 1964.

The Food Stamp Act of 1964 (7 U.S.C. § 2011, *et seq.*) is still another example of federal-state cooperation where benefits are made available to strikers. Several amendments to the original Act have been attempted which would have precluded an individual who is participating in a strike from receiving food stamps. All these attempts have failed.*

The States were originally left free to determine their own eligibility requirements subject to the Secretary of Agriculture's approval. In 1971, Congress amended the section of the statute under which the States were allowed to set eligibility standards for the Food Stamp Act and required the Secretary of Agriculture to create "uniform national standards of eligibility." 7 U.S.C. § 2014(b). Although it specifically required a national standard disqualifying households with able-bodied adults who refuse to register or accept employment, Congress added a provision:

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* See: H. Conf. Rep. No 1908, 90th Cong., 2nd Sess., p. 2 (1968), 1968 U.S. Code Cong. and Admin. News, p. 3957; 93rd Cong., 1st Sess., 119 CONG. REC. S15238 (daily ed. July 31, 1973); 93rd Cong., 1st Sess. .119 CONG. REC. S21463 (daily ed. November 29, 1973); 93rd Cong, 2nd Sess., 120 CONG. REC. H5598 (daily ed. June 21, 1974).

"Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment." 7 U.S.C. § 2014(c).

It is important to note that this provision refers to the employee's refusal to work at *his own site or plant* during a strike as well as to take new work at a site involved in a strike. As previously noted, the stated reason for this treatment of strikers was Congress' determination not "*to take sides in labor disputes,*" (emphasis added) H.R. Rep. No. 1402, 91st Cong., 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News, pp. 6025, 6035.

This congressional view of neutrality is fatal to petitioners' claim that State enactments according striker benefits thrust the State into an improper role under federal strictures.

D. Aid to Families with Dependent Children—Unemployed Father.

Congress has also considered the exclusion of strikers from receipt of Aid to Families with Dependent Children—Unemployed Father (hereinafter "AFDC-U") benefits. In 1972, the Nixon Administration sought an explicit provision removing strikers as eligible persons under this program. S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 108, 472-3 (1972). This proposal was deleted prior to a Senate vote, 118 Cong. Rec. 33992-5 (1972).* In 1973 legislation was intro-

* See *Super Tire Engineering Company* v. *McCorkle,* 550 F. 2d 903 (3d Cir.), *cert. den.,* 434 U.S. 827 (1977), *rehearing den.* —— U.S. ——, 54 L. Ed. 2d 773, where the Third Circuit rejected the argument that a state provision permitting the payment of welfare to strikers violated federal welfare law and the NLRA. This resolution of the challenge to such payments has significant implications

(footnote continued on following page)

duced in the House which would have mandated striker eligibility for benefits in those states which participate in the AFDC-U program. These bills were defeated. H.R. 9422, 9748, 9903, 93rd Cong., 1st Sess. (1973).

Prior to 1968, each State established its own definition of the term "employment" under its AFDC-U program (42 U.S.C. § 601, *et seq.*). Some States included strikers in the definition while others did not. The 1968 amendments to the Social Security Act* were designed to provide a more uniform application of the AFDC-UF program. Even under these amendments, despite legislative history describing their intent as requiring "a uniform definition of unemployment throughout the United States," local options were *preserved* by the Secretary of Health, Education and Welfare in a regulation upheld by this Court. *Batterton* v. *Francis,* 432 U.S. 416, 429-432 (1977). Under the NLRA, however, a uniform national standard which would have

(footnote continued from preceding page)

in the case at bar. It is important to note at the outset that unemployment benefits, unlike welfare payments, are available in New York only in the small percentage of strikes that are greater than eight weeks. Moreover, under petitioners' rationale, the consequence of paying welfare benefits to needy persons is to provide economic aid to the group of strikers who cannot afford to be without a salary and thus would otherwise quickly return to work. Welfare assists strikers as to whom there has *been a finding that they have no alternate resources available.* Since such eligibility does not conflict with the federal labor laws, the New York statute clearly does not contravene any congressional prohibition. As the Fourth Circuit held in *Francis* v. *Chamber of Commerce of the United States,* 529 F. 2d 515 [text unreported, 4th Cir., Sept. 22, 1975, 74 Civil 1991], reversed on other grounds *sub nom. Batterton* v. *Francis,* 432 U.S. 416 (1977): "We do not view the national labor policy and the national social policy as irreconcilable, but if they are so viewed, there is presented a policy question for the Congress that is not for us to decide." (Slip. op. p. 4).

* 81 Stat. 882, 42 U.S.C. § 607(a).

applied to receipt of unemployment insurance by striking workers was *rejected* by Congress.*

E. The Message of the Legislative History.

Petitioners' attempt to characterize this legislative history as "unconnected" and inconsistent (p. 33) signally fails to deal with the wealth of material supporting the unanimous decision of the Second Circuit.**

What conclusion must be drawn from explicit Committee reports, floor debate, pertinent statutory provisions, and recent congressional amendments, all relating to requiring or permitting the payment of unemployment compensation to strikers, and all consistent in demonstrating that Congress does not view the disqualification of strikers for benefits as essential to the NLRA's regulatory scheme? This Court considered precisely the same kind of legislative history, based on the same kind of documents in *Hodory, supra,* 431 U.S. at 488. In rejecting preemption

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* *Supra,* p. 42 Petitioners, however, maintain that Congress has willed "enforced national uniformity" in this area (p. 41).

** See also the detailed legislative history of the Social Security Act in Point I A, *supra.* Petitioners call these expressions of policy "silence" and "inaction" (p. 34), despite testimony on the floor of Congress (see e.g. statements of House Ways & Means Committee Chairman (p. 30, *supra*), and the enactment of bills which mandate the payment of benefits to striking employees. Their reference (p. 35) to 2A Sutherland, ***Statutory Construction,*** § 49.10 at 261 (4th ed. 1973) is also inapposite, since that discussion concerns acquiescence or inaction by a Legislature as a poor basis for presuming the *adoption* (not rejection) of a new statutory requirement.

It should be noted that this Court was guided by "[t]he fact that Congress has chosen *not* to legislate on the subject of labor dispute disqualifications" (emphasis added) in rejecting the preemption challenge posed in *Ohio Bureau of Unemployment Services* v. *Hodory, supra,* 431 U.S. at 488-489.

claims under FUTA and the Social Security Act, this Court held:

> "[S]tudy of the various provisions cited shows that when Congress *wished to impose* or *forbid* a condition for compensation, it was able to do so in explicit terms." (Emphasis added).

It is indisputable that Congress is similarly capable of requiring or prohibiting a condition for payment of benefits under the NLRA.

III. THE ELEVENTH AMENDMENT APPLIES TO SUITS FOR MONEY DAMAGES AGAINST THE NEW YORK STATE DEPARTMENT OF LABOR AND THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, SEEKING RETURN OF TAXES PAID TO THE STATE'S UNEMPLOYMENT INSURANCE FUND.

Petitioners seek from the State of New York a refund of taxes paid under Article 18 of the New York Unemployment Insurance Law. Since, as was undisputed below, New York State has not consented to a suit for money damages in federal court, the case falls squarely within the prohibition of the Eleventh Amendment.*

This Court has set out the fundamental principles of the Eleventh Amendment in a decision directly applicable to the case at bar. In *Edelman* v. *Jordan,* 415 U.S. 651, *rehearing denied,* 416 U.S. 1000 (1974), the plaintiff alleged that Illinois state officials administered a Federal-State program of Aid to the Aged, Blind and Disabled (AABD) in a manner inconsistent with certain federal regulations and the Fourteenth Amendment. The District Court granted declaratory and injunctive relief and ordered state officials to remit AABD benefits wrongfully withheld to eligible applicants, and the Court of Appeals affirmed.

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* That amendment, adopted in 1795 and ratified in 1798, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The District Court herein held that the Eleventh Amendment did not bar petitioners' claim for money damages (Pet. 53a-54a). The Second Circuit did not reach the question, since it reversed the District Court on other grounds and directed that the complaint be dismissed (Pet. 18a).

This Court reversed. Looking to the historical evolution of the Amendment, it concluded (415 U.S. at 663):

> ". . . the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."*

Petitioners in the instant case ascribed a hidden restrictive intent to this Court's use on several occasions of the phrases "state treasury" and "general revenues", and concluded that since the Unemployment Insurance Fund is separate from the general state treasury, *Edelman* did not foreclose "retroactive damages"** in the case at bar. Such an interpretation is erroneous. It is clear on reading *Edelman* as a whole that these terms were used in their generic sense to include all State funds. *Edelman* bars all suits when the action "is in essence one for the recovery of money from the state" (p. 663, quoting with

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* It is clear that the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity even though, as here, individual officials or state agencies are the named and nominal defendants. *Ford Motor Co.* v. *Dept. of Treasury,* 323 U.S. 459, 464 (1945).

** Petitioners' Memorandum in the Second Circuit, pp. 91-92. It may be noted that Unemployment Insurance Law § 550(3) simply insures that the tax collected pursuant to § 560.1 is available solely for the benefit of unemployed workers. The tax rates are calculated so as to provide sufficient revenue for this purpose. § 550(4) reflects the fact that the federal government underwrites administration expenses of the Fund. 28 U.S.C. § 3304(a)(4)(B). Under § 550.1, all contributions immediately become part of a pooled fund available to pay benefits to any individual entitled thereto and no employer acquires any prior claims or rights to the sums credited to its account. No matter how much the total of contributions paid by an employer during its lifetime may exceed the benefits collected by its former employees, the employer has no right to obtain any refund therefor, nor is it entitled to a credit of any kind other than its use as a means of measuring its experience for the establishment of its prospective contribution rate (§§ 550, 581).

approval from *Ford Motor Co.* v. *Dept. of Treasury,* 323 U.S. 459 [1945]); involves "substantial expenditures from the public funds of the state" (p. 665, quoting with approval from *Rothstein* v. *Wyman,* 467 F. 2d 226 [2d Cir. 1972], *cert. denied,* 411 U.S. 921 [1973]). The basic constitutional proscription as restated in *Edelman* operates to bar suits to recover any public funds absent the State's consent. That these public moneys may be in one fund or another is of no moment to this principle.*

This Court's decision in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976) results from a specific constitutionally sanctioned exception to the holding in *Edelman, supra,* and supports respondents' position that Telco's attempt to obtain a refund of taxes is barred by the Eleventh Amendment. In *Fitzpatrick,* the plaintiffs, consisting of all present and retired male Connecticut employees who were members of the State Employees' Retirement System asserted, *inter alia,* that the State Employees Retirement Act discriminated by sex and thereby violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e. The plaintiffs

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* Here petitioners seek recrediting of their unemployment insurance accounts, retroactive to the commencement of benefit payments to strikers in 1971, in the amount paid out as the result of the 1971-1972 CWA strike, and the reimbursement of payments of taxes in excess of those which would have been due if unemployment insurance had not been paid during the 1971-1972 strike.

In suits seeking recovery of retroactive benefits, the immunity of the Eleventh Amendment must be given full force. Characterization of the relief as a "refund" or "equitable restitution" rather than damages does not dictate a different result. *Ford Motor Co.* v. *Dept. of Treasury, supra.* This Court specifically rejected this approach in *Edelman,* holding that the relief requested must be judged "in the context of the important constitutional principle embodied in the Eleventh Amendment." *Edelman, supra,* 414 U.S. at 666 (footnote omitted). The substantive nature of the remedy sought controls, not the formal label attached to it.

sought retroactive benefits from the Retirement Fund, to which the State was required to provide by appropriation at least 75% of the retirement income paid each year.

Fitzpatrick held that because the enforcement provision (§ 5) of the Fourteenth Amendment specifically authorized suits against the State and it was pursuant to § 5 that Congress enacted Title VII, the Eleventh Amendment did not bar the payment of the retroactive retirement benefits demanded by plaintiffs.* This Court stated (427 U.S. at 456):

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are *constitutionally impermissible in other contexts* . . ." (Emphasis added).**

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* In the instant case, the District Court's Memorandum and Order of March 26, 1975 denying respondents' motion for summary judgment expressed "substantial doubt" as to the validity of petitioners' equal protection and due process claims. The Second Circuit rejected the Fourteenth Amendment contentions set forth in the complaint, noting that this constitutional provision does not give the federal courts the power to impose their views on economic and social policy on the States, that the statute meets substantive due process requirements, and that no violation of procedural due process was claimed (Pet. 17a-18a). Petitioners relied below primarily on their preemption argument.

Moreover, it is clear that Congress has not mandated by appropriate enabling legislation that firms which make payments into the unemployment insurance system be given the right to sue the States for claims arising out of the administration of the program. Petitioners have not met the requirements of *Fitzpatrick* and therefore may not avoid the strictures of the Eleventh Amendment.

** Aside from the bar against retrospective enforcement of this judgment under the Eleventh Amendment, *Edelman* v. *Jordan, supra,* retroactive relief would be unwarranted. A statute in

(footnote continued on following page)

See also *Hutto* v. *Finney,* —— U.S. ——, 46 U.S.L.W. 4817 (June 23, 1978), where award of attorneys' fees against a State was affirmed on the grounds that such fees 1) served the purpose of a remedial fine imposed to insure enforcement of prospective relief and 2) constituted costs, which have traditionally been granted without regard to the Eleventh Amendment. This Court noted (46 U.S.L.W. 4822, n.33) that the claim was based on a statute enacted to enforce the Fourteenth Amendment, as in *Fitzpatrick* v. *Bitzer, supra,* rather than on "a statute rooted in Congress' Article I power," such as the rejected claims in *Edelman* v. *Jordan, supra.*

In light of the strict limitations placed by *Fitzpatrick* v. *Bitzer, supra,* on judicial incursions into the Eleventh Amendment area, it is clear that the case of *Bowen* v. *Hackett,* 387 F. Supp. 1212 (D.R.I. 1975) relied on by petitioners below (at pp. 92-94) cannot provide authority for Telco's contentions. Moreover, the confusion in the *Bowen* court's analysis also demonstrates that its holding is erroneous. It relies upon cases involving turnpike authorities to find that the Eleventh Amendment may not shield programs administered by "an agency or instrumentality . . . created by the state legislature [to perform] certain governmental functions."* This description does not appear to apply to the Rhode Island program, and obviously does not apply to the New York situation where the law under

(footnote continued from preceding page)

full force and effect for over forty years is entitled to a presumption of constitutionality in its application, until it is conclusively ruled otherwise. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 107 (1971). Even assuming *arguendo* the correctness of petitioners' claims, the State was entitled to rely on the validity of this 1935 law and a judicial ruling must therefore be limited to prospective application.

* *Bowen, supra,* 387 F. Supp. at 1220.

attack is administered by an *executive department* of the State government without the "indicia of independence from the sovereign"* sometimes found in a special operating authority (such as a turnpike authority).

As is obvious from the caption of this action, respondents in the instant case are State departments and officials. These revenues are administered by the State.** The State Commissioner of Taxation and Finance is the legal custodian of the funds, which may only be disbursed by the Industrial Commissioner subject to prior approval by the State Comptroller. The State Commissioner of Taxation and Finance may deposit any funds not needed for immediate use in the same manner as he may deposit *"other state funds."* Unemployment Insurance Law § 550(2) (Emphasis added).

Nor does the source of State funds provide a basis for evading the Eleventh Amendment's proscription. See e.g. *Wade* v. *Mississippi Co-op. Extension Service,* 424 F. Supp. 1242 (N.D. Miss. 1976), where the court rejected the contention that a judgment for back pay would not be barred by the Eleventh Amendment if such judgment were payable "from private contributions or federal grants or mineral leases on federally-granted state lands held in their name or other similar non-appropriated funds." The court ruled:

> "Albeit such payment would not be literally out of the general treasury, payment of damages from any

* 387 F. Supp. at 1222.

** Contributions by employers are excise taxes based upon utilization of the privilege of employing individuals; the employer must continue to pay the tax regardless of the aggregate of benefits, if any, paid to his former employees, and all eligible and qualified persons have the right to receive benefits. *Matter of Cassaretakis,* 289 N.Y. 119, 126 (1942), affd. 319 U.S. 306 (1943).

source of funds—assuming the court could properly authorize such a payment—would directly deplete the funds otherwise utilized by these non-autonomous, nonprofit state agencies in performing their important governmental, nonproprietary functions." (424 F. Supp. at 1257.)

This rationale is clearly applicable in the case at bar, where state agencies are administering the state funds at issue for vital state purposes. The fact that the moneys here were originally paid as taxes by the employer does not remove the bar of the Eleventh Amendment. As this Court has held, employers participate in the unemployment insurance program as taxpayers, and their obligation is to the State. *Carmichael* v. *Southern Coal and Coke Co., supra,* 301 U.S. at 508. *NLRB* v. *Moss Planing Mill Co.,* 224 F. 2d 702, 704 (4th Cir. 1955).

Cases which find that local school boards are not immune from damages under the Eleventh Amendment are inapposite. See *Hander* v. *San Jacinto Junior College,* 519 F. 2d 273 (5th Cir. 1975); *Adams* v. *Rankin County Board of Education,* 524 F. 2d 928 (5th Cir. 1976); *Unified School District* v. *Epperson,* 551 F. 2d 254 (10th Cir. 1977), reversed on other grounds, *sub nom. Smalling* v. *Epperson,* —— U.S. ——, 46 U.S.L.W. 3615 (1978). In all these cases, the inquiry was whether local political subdivisions, such as counties and municipalities, could partake of the State's Eleventh Amendment immunity. Cf. *City of Lafayette* v. *Louisiana Power & Light Company,* —— U.S. ——, 98 S. Ct. 1123, 1136 (1978).

The courts in the school board cases looked to several elements in answering this inquiry. They found that school boards are accorded a higher degree of autonomy and indipendence than state agencies, as public education is traditionally a matter of local concern rather than state control. *Hander, supra,* p. 278; *Adams, supra,* p. 929; *Unified*

School District, supra, p. 260. The *Unified School District* decision also noted that the funds at issue were raised by local levy within the school district and were not part of the state treasury. By contrast, as previously shown, the State's Unemployment Insurance Fund is controlled and administered solely by state officials.* It is a creation of State statute, funded on a statewide basis, without the power to levy taxes on its own behalf or to raise additional funds in any manner, and in no way autonomous from the State. Petitioners' challenge is to a statewide program,** and the rate of employer contributions is set by the State (Unemployment Insurance Law, § 570). Since these contributions are neither raised nor administered locally, the fact that the moneys are contained in a particular state fund is irrelevant to the operation of the Eleventh Amendment. See *Wade* v. *Mississippi Co-op. Extension Service, supra.* Moreover, Unemployment Insurance Law § 551 provides that if any moneys properly committed to the Fund are inappropriately expended,

"... it is the policy of this state that such moneys be replaced by moneys to be transferred from the

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* The federal statutory scheme permits only the States and State officials to participate in the administration of unemployment insurance programs. The Social Security Act provides for federal grants "for the purpose of assisting the States in the administration of their unemployment compensation laws . . ." (42 U.S.C. § 501) and the amount of the federal funding is in part determined by the population of the State (42 U.S.C. § 502). If the Secretary of Labor determines that a State's administration of the program is not in conformity with the Social Security Act and the Federal Unemployment Tax Act he must so advise the Governor and the State may petition for judicial review of the Secretary's determination (42 U.S.C. §§ 503, 504; 26 U.S.C. §§ 3304, 3310).

** Another example of state moneys derived from employers and kept separate from the state treasury is the Disability Benefits Fund of the State Insurance Fund, from which disability benefits to injured employees are paid. See Workmen's Compensation Law, §§ 76, 204.

special fund or appropriated for such purpose from the *general revenues of this state* . . . If the moneys available in the special fund are not sufficient for this purpose, the Commissioner *shall* promptly report the additional amount required for such replacement to the governor and the governor *shall,* at the earliest opportunity, submit to the legislature a request for the appropriation of such amount." (Emphasis added).

It was also held that the State's own definition of the entity in question, as found in statute and case law, was crucial. *Hander,* pp. 278-280, *Unified School District,* pp. 259-260. This Court found in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1976), that petitioner local school board was "more like a county or city than it is like an arm of the State," in part because under Ohio law the "State" does not include "political subdivisions," while the term "political subdivisions" does include local school districts. (429 U.S. at 280).* See in accord *Jagnandan* v. *Giles,* 538 F. 2d 1166 (5th Cir. 1976), where it was held that the Eleventh Amendment barred a claim for reimbursement of excess tuition payments made under a statute declared to be unconstitutional. The Fifth Circuit relied upon Texas statutory and decisional law in reaching its conclusion. (538 F. 2d at 1174-1178).

In the case at bar, state law on the status of the Unemployment Insurance Fund is clear. The State Legislature has determined that the moneys sought by Telco are "state funds." (Unemployment Insurance Law, § 550[2].) The New York State courts have also unequivocally so held. In *Manufacturers Trust Co.* v. *Corsi,* 61 N.Y.S. 2d 769, 770

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* See also *Monell* v. *Department of Social Services of the City of New York,* —— U.S. ——, 46 U.S.L.W. 4569, 4580 n.63 (June 6, 1978), where this Court referred to the congressional definition of "local educational agency" as dependent upon such an entity's status under state law.

(Sup. Ct., N.Y. Co., 1946), plaintiff brought an action against the State Industrial Commissioner to recover moneys exacted from plaintiff as contributions to the Fund. The court dismissed the suit, ruling:

> "A successful recovery by plaintiff would . . . inevitably diminish the amount of moneys available for use by the State for the relief of unemployment. Consequently, any action to recover moneys exacted under the Employment Insurance Law, when brought against the Industrial Commissioner in his official and public capacity, *is one wherein the State,* though not added as a party defendant, *is the real person against whom any judgment for plaintiff will operate.*
>
> "The prosecution of claims and actions against the sovereign State may be brought only in a forum in which it has consented to be sued." (Emphasis added).

The same principle has been established by this Court. In *NLRB* v. *Gullett Gin Co.,* 340 U.S. 361, 364 (1951), it was held:

> "Payments of unemployment compensation were not made to the employees by respondent [employer] but by the state out of *state funds derived from taxation.* True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state." (Citations omitted) (Emphasis added)

Thus, petitioners' quest for a refund, like their search for a preemptive federal provision, must collide with the law as established by Congress, the New York State Legislature, and the federal courts.

CONCLUSION

For all the reasons stated herein, the decision below should be affirmed.

Dated: New York, New York
August 11, 1978

Respectfully submitted,

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